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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANGEL A., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

M.G.,

Defendant and Appellant.

D055778

(Super. Ct. No. SJ11887)

APPEAL from a judgment of the Superior Court of San Diego County, Garry G.
Haehnle, Judge. Affirmed.

M.G. appeals the judgment terminating her parental rights as to her son, Angel A.
She contends that the juvenile court erred by summarily denying her Welfare and
Institutions Code¹ section 388 petition and by declining to apply the beneficial

¹ All further statutory references are to the Welfare and Institutions Code.

relationship exception to termination (§ 366.26, subd. (c)(1)(B)(i).) We affirm the judgment.

I

BACKGROUND

When Angel was born in October 2007, both he and M.G. tested positive for amphetamine. M.G. admitted that she had used methamphetamine during her pregnancy. She had little prenatal care and had a recent history of daily methamphetamine use. The San Diego County Health and Human Services Agency filed a dependency petition based on these facts. Angel was detained in the hospital and later, in a foster home. In December the court entered a true finding on the petition and ordered Angel placed in foster care. In April 2008, after a stay in a second foster home, Angel was moved to the foster home of Carlos and Gloria V. (the V.s). The V.s were committed to adopting Angel if M.G. did not reunify with him.

In November 2008 M.G. was arrested for transporting eight kilograms of marijuana across the border from Mexico into the United States. She pleaded guilty to possessing marijuana for sale, was placed on probation and sentenced to 18 days in jail. In December M.G. completed a substance abuse treatment program. In January 2009 the court terminated reunification services and set a section 366.26 hearing. In August, just two weeks before the hearing, M.G. filed a section 388 petition. In her petition, M.G. requested that Angel be placed with her and that she be provided family maintenance services. The court denied an evidentiary hearing on the petition and terminated M.G.'s parental rights.

II

DISCUSSION

A

*The Court Did Not Abuse its Discretion
By Summarily Denying M.G.'s Section 388 Petition*

Section 388 allows the juvenile court to modify an order if a party establishes, by a preponderance of the evidence, that changed circumstances exist and that the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both of these elements. (*Ibid.*; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra*, at p. 806.) We review the summary denial of a section 388 petition for abuse of discretion. (*Id.* at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431, 433.)

M.G. alleged in her section 388 petition that it was in Angel's best interests to be placed with her because she was "able to safely care and provide for [him]." As changed circumstances, the petition alleged three factors. First, M.G. had completed a parenting class in May 2009. Second, she had negative drug tests in January, February, March and May. Third, M.G.'s therapist reported in May that M.G. recognized that her methamphetamine use during pregnancy had placed Angel at risk of developmental

delays, and that her attempt to transport drugs across the border had jeopardized their reunification. M.G. continued therapy after the court terminated services² and claimed to have been clean since she began her reunification plan.

In denying a hearing on the section 388 petition, the court found that M.G.'s circumstances were changing, but not changed. The court further stated that even if circumstances had changed, there was no showing that it would be in Angel's best interests to be removed from the V.s and returned to M.G. Angel had been moved several times. He was comfortable in his foster placement and regarded it as his home. The V.s loved him and took good care of him. M.G. had been provided many opportunities to prove that it would be in Angel's best interests to be returned to her and had failed to do so.

The court did not abuse its discretion by summarily denying the section 388 petition. The changes that M.G. alleged—several negative drug tests, completion of a parenting class, continuation of therapy and awareness that her actions had harmed Angel—demonstrated, at most, changing circumstances. Further, the case was well past the reunification phase; the focus was now on Angel's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) There was a rebuttable presumption that continued foster care was in his best interests. (*Ibid.*) M.G. failed to make a prima facie showing that placing Angel with her would promote his best interests. He had never

² In a letter that was admitted in evidence at the section 366.26 hearing, after the court had denied the section 388 petition, M.G.'s therapist stated that the therapist had no contact with M.G. between May 5, 2009 and August 5. On August 5 M.G. called the therapist and asked her to write a letter to the court.

lived with her and was attached to the V.s, with whom he had lived for most of his life. They were committed to meeting his needs and providing him a permanent home.

B

*The Court did not Err by Failing to Apply
The Beneficial Relationship Exception*

If a dependent child is adoptable,³ the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent establishes the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80.) One such exception exists if "[t]he parent[] [has] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The existence of this relationship is determined by taking into consideration "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs. . . ." (*Id.* at p. 576.) Examining the evidence in the light most favorable to the judgment, we conclude that there is substantial evidence to support the court's finding that M.G. failed to meet her burden of showing that she shares a beneficial

³ M.G. does not contest the juvenile court's finding that Angel was adoptable.

relationship with Angel.⁴ (*Id.* at pp. 576-577; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

At the time of the section 366.26 hearing, Angel was 22 months old. He had lived with the V.s for 16 months and had never lived with M.G. Angel had a stable and safe home with the V.s. They provided for all of his needs and were dedicated to helping him overcome his developmental delays. M.G. showed no interest in learning about Angel's delays or the services he needed.

M.G.'s visits with Angel were supervised, except for the five months preceding her arrest. From May 2008 to April 2009, Angel cried and sought out Gloria during visits rather than interacting with M.G. Beginning in May 2009, he showed more interest in M.G., played with her and seemed to enjoy visits more. However, he still turned to Gloria to meet his needs and provide comfort and showed no distress at leaving M.G. At a visit in July, M.G.'s eyes were glassy and she did not interact with Angel at first. At the next visit, M.G. said that she had stopped drug testing but that she was going to start testing again.

While M.G. was affectionate and appropriate with Angel during the latter months of the case, Angel did not have "a substantial, positive emotional attachment" to her of

⁴ The court's finding regarding M.G.'s visitation and contact with Angel is unclear. The court stated: "The visits up until the time of April of '09 or after March of '09 were inconsistent. They weren't -- I can't say they were -- the social worker's testimony is that they were consistent, but the quality of the visits the court has to look at and determine." The record shows that M.G.'s visits were somewhat irregular before April 2009. After April, the visits were more consistent. In light of M.G.'s clear failure to meet her burden of showing a beneficial relationship, we need not discuss further whether she maintained regular visitation and contact with Angel.

the kind that would outweigh the well-being that he would gain in a permanent, adoptive home, and there is nothing to indicate that Angel would be greatly harmed by the severance of his relationship with M.G. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) There is substantial evidence to support the juvenile court's finding that the beneficial relationship exception does not apply.⁵

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

⁵ M.G. relies on *In re S.B.* (2008) 164 Cal.App.4th 289, in which this court concluded that the juvenile court erred by declining to apply the beneficial relationship exception. (*Id.* at p. 301.) In that case, the child was five years old (*id.* at pp. 293, 295), the appellant father had been her primary caretaker for three years, she displayed a strong attachment to him (*id.* at pp. 299-301), and they "had an emotionally significant relationship." (*Id.* at p. 298.) These factors were not present here.